

High Court Will Hear Illegal Wiretap Cases

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The Supreme Court agreed yesterday to decide whether a grand jury witness can refuse to answer questions until the government proves that the questions are not based on information obtained from illegal wiretaps.

Two lower court rulings — one favoring the Justice Department's position in a gambling investigation and the other reversing a contempt citation against a witness in the "Harrisburg 8" kidnap conspiracy case, were set down for full review in the spring.

All nine justices, including Lewis F. Powell Jr. and William H. Rehnquist, will be eligible to decide the cases, which are typical of numerous pending tests of federal investigatory powers.

The Justice Department's internal security division argues that witnesses subpoenaed before grand juries have no right to contest the legality of any government searches or surveillance because such contests would disrupt the grand juries in their need to ferret out facts.

Balky witnesses, many of whom charge that they are caught up in "political" prosecutions, argue that since they can't be imprisoned on the basis of illegal evidence in an ordinary criminal case, they have the right to make sure they are not jailed for contempt for remaining silent when asked questions that spring from an illegal source.

Witnesses and defendants contend that illegal wiretaps underlie much of the government's inquiries into alleged domestic subversion, and that being compelled to answer

questions flowing from such taps amounts to a continuing violation of their constitutional rights.

The Justice Department maintains that warrantless but presidentially approved taps of suspected radicals and terrorists are legal — an issue awaiting decision by the Supreme Court next year — but that the government needn't defend their legality in a contempt proceeding growing out of a grand jury investigation.

One of the cases set for argument involved two Roman Catholic nuns, Sister Jogues Egan and Sister Anne Elizabeth Walsh, who refused to talk to a grand jury in Harrisburg, Pa., despite grants of immunity from prosecution on incriminating evidence compelled from them under threat of contempt.

They were summoned after the grand jury had returned a conspiracy indictment charging the Rev. Philip Berrigan and others of plotting to kidnap White House security adviser Henry Kissinger and blow up heating tunnels in government buildings here.

Ordered to prison until they answered the questions, the nuns won their freedom when the Third U.S. Circuit Court of Appeals in Philadelphia ruled that they were entitled to hearings on their eavesdropping claims. The Justice Department refused to tell lower courts whether they had overheard the witnesses' phone conversations, legally or otherwise.

In the gambling case, the government acknowledged overhearing grand jury witnesses David Gelbard and Sidney Parna, but said the wiretaps were authorized by a

court under the 1968 Federal Crime Act. The government persuaded lower courts in California that the witnesses, unlike defendants at criminal trials, had no right to contest the wiretaps' validity at this stage.

Widespread confusion over this issue has snarled investigations into the Mayday disturbances in Washington, the bombing of the Capitol, and the government's Pentagon Papers investigation, among others.

In other action:

Sentencing

Despite the votes of three justices to hear the case, the court refused to review the consecutive maximum sentences meted out by a federal judge in San Francisco against Owsley Stanley for possession and manufacture of LSD, after prosecution and defense agreed that "possession was the end product of the manufacture."

In late October Justice William O. Douglas delivered an opinion signed only by himself that with two seats on the court vacant, the votes of "three out of seven are enough" to obtain review in the Supreme Court.

Justices William J. Brennan Jr., Potter Stewart and Thurgood Marshall all voted to hear Stanley's case, but the court denied review. Douglas did not vote to hear the case.

Solicitor General Erwin N. Griswold, in a major concession, had urged the court to accept Stanley's case and ruled that he was entitled to resentencing under a drug law that was amended last year.

Prisons

Over the dissent of Chief Justice Warren E. Burger, the court summarily reversed the refusal of lower federal courts to entertain a suit by inmates of the Missouri State Penitentiary protesting living conditions.